No. SC86417

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

RONALD HAMPTON, Jr.,

Appellant.

APPEAL FROM ST. LOUIS COUNTY CIRCUIT COURT
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MELVYN W. WIESMAN, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals from a St. Louis County Circuit Court judgment convicting him of one count of first-degree murder (§ 565.020, RSMo 2000) and one count of armed criminal action (§ 571.015, RSMo 2000), for which Appellant received consecutive sentences of life imprisonment without the possibility of probation or parole and life imprisonment. Following an opinion of the Missouri Court of Appeals, Eastern District, affirming Appellant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

Appellant was indicted in St. Louis County Circuit Court on one count of first-degree murder and one count of armed criminal action in connection with the February 15, 2002 shooting death of Daryl Chatman. (L.F. 22-25). Appellant was tried by a jury on May 27-30, 2003, before Judge Melvyn W. Wiesman. (L.F. 5-6). Appellant does not contest the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence at trial showed that:

A few months before the murder, the victim, Daryl Chatman, his fiancee, Domonica Miller, and her son and daughter moved into a new house on Wagner Street in Wellston, Missouri. (Tr. 333-35, 371). Appellant lived in the house across the street. (Tr. 336, 752). Appellant and several other people would congregate across the street from the victim's home at all hours of the day. (Tr. 373, 376-77, 380). The victim's house was also vandalized; the garage door was spray-painted orange and the outside water faucet was left running all day. (Tr. 373, 376). The victim had several arguments with the people gathered across the street concerning their activities. (Tr. 381-82). And Appellant and the victim had several verbal altercations during this time. (Tr. 672).

A few hours before the murder, which occurred at approximately 11:30 p.m. on February 15, 2002, the victim and his fiancee were leaving their home to go to the movies when they saw several individuals playing dice on the sidewalk near their house. (Tr. 382). The victim asked his fiancee to call the police and report the gambling, which she did. (Tr. 382-83). The police arrived and broke up the game. (Tr. 383-84, 753-54). Appellant, his life-long friend Sam Williams, who also lived on Wagner, and another individual were involved in the dice game. (Tr. 465, 751, 753-54, 817).

Later that evening, when the victim and his fiancee attempted to leave the house again, someone ran up to their car and said to the victim, "you punk ass nigger, you called the police." (Tr. 384). The victim denied calling police and got out of his car. (Tr. 384). When a crowd, including some individuals with sticks and boards, began to gather, Appellant's father told them to leave the victim alone. (Tr. 384-85, 754).

The victim and his fiancee ultimately decided not to go to the movies, and the victim left his house to visit a friend. (Tr. 385). Another altercation, this one between Appellant and the victim, began just after the victim left the house. (Tr. 341, 755). The victim

attempted to punch Appellant during the argument, but missed. (Tr. 666, 755). As Appellant drove away from the area he yelled to the victim, "I'm getting your ass, nigger." (Tr. 342-43, 388, 756).

Later that evening, Appellant and his friend Sam Williams saw Appellant's uncle, Michael Shanks, and the pair showed Shanks the guns they were carrying. (Tr. 666-67, 672, 757). Appellant was carrying an automatic pistol, and Williams had a revolver. (Tr. 672, 722, 756-57). Appellant told his uncle that they were having problems with the victim. (Tr. 666-67). Appellant, Williams, and Appellant's girlfriend went to a school dance and later returned to Appellant's house on Wagner. (Tr. 759-61). They were later joined by Appellant's brother, Anthony Ford, and the individual who had been involved in the earlier dice game. (Tr. 464-65, 762).

At approximately 11 p.m. that night, the victim's fiancee arrived home, pulled into the garage, and saw that the victim had not yet returned to the house. (Tr. 392). Fifteen minutes later, the victim's fiancee heard the victim pull into the garage. (Tr. 392-93). As she opened the door from the kitchen to the garage and saw the victim getting out of the car, Appellant ran into the garage and began

shooting at the victim.[1] (Tr. 395-97).

Appellant fired numerous shots at the victim. (Tr. 398). On the floor of the victim's garage, the police recovered eleven shell casings fired from the same .40 caliber semi-automatic pistol. (Tr. 530-36, 587, 589, 598, 611-12, 618-19). The victim, who died on his garage floor, was shot in the chest, right lower back, and right buttock. (Tr. 435-37, 438, 440, 442). The fatal wound was a gunshot to the chest that pierced the victim's heart. (Tr. 435-38).

During an interview with police, Appellant not only admitted that he saw the victim drive down the street just before the shooting, but that he was also armed with a semi-automatic handgun at the

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[1]The victim's fiancee was unable to identify the shooter, except that he was a young black male wearing blue pants and a red sweater. (Tr. 397). Appellant's friend, Sam Williams, testified at trial that he was present when the shooting occurred and that he saw Appellant run into the victim's garage and shoot him. (Tr. 766-67, 784, 843). Appellant's brother, Anthony Ford, who was also present, told police that Appellant had shot the victim (Tr. 464, 468), but at trial Ford denied that he was present when the shooting occurred. (Tr. 269, 277, 281).

time. (Tr.665, 672). Although Appellant told police that his friend Sam Williams did not shoot the victim, Appellant never admitted that he was the shooter. (Tr.692, 700). As the detective continued his questioning, Appellant became uncooperative, refused to answer any other questions, and told the detective that he didn't care and to go ahead and give him 30 or 40 years because he would still be young when he got out. (Tr. 678-79).

Sam Williams was also arrested in connection with the shooting and was charged with second-degree murder.[2] (Tr. 497, 504, 750). While Williams was incarcerated, Appellant wrote him several letters telling Williams to keep his mouth shut. (Tr. 775-77, 808). Appellant also wrote to Williams that if the time came, Appellant would stand up and "take his weight." (Tr. 777). In exchange for Williams's testimony, the State dropped the murder charge against

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[2]Appellant's uncle, Michael Shanks, told police that he saw Sam Williams run out of the victim's garage after the shooting. (Tr. 718, 722-23). Williams testified at trial that he wasn't the shooter. (Tr.750). Williams also testified that Appellant wrote him a letter in which he acknowledged that his uncle had falsely accused Williams. (Tr. 837-38).

him, and Williams pleaded guilty to carrying a concealed weapon. (Tr. 792-93, 796).

Appellant did not testify at trial, but called the investigating detective who testified that Appellant claimed that someone named Ricky Caldwell shot the victim. (Tr. 860). The detective was unable to identify, much less locate, anyone named Ricky Caldwell in connection with this crime.[3] (Tr.723-24).

The jury found Appellant guilty of first-degree murder and armed criminal action. (Tr.965-66). The trial court later sentenced Appellant to consecutive sentences of life imprisonment without the possibility of parole and a life sentence. (Tr. 984-85, LF. 108-10). This appeal followed.

[3]No other witness, except Appellant, stated that someone named Ricky Caldwell was present when the shooting occurred. (Tr. 866).

ARGUMENT

I.

The trial court did not clearly err in overruling Appellant's *Batson* challenge to the State's peremptory strike of veniremember Jones because the State offered a valid, race-neutral reason for the strike — that Jones had previously testified as a witness in a criminal case — and Appellant failed to prove that this reason was pretextual in that after the trial court initially disallowed the strike on the ground that another allegedly similarly-situated veniremember was not struck, the State was permitted to reconsider its peremptory strikes to remove both veniremember Jones and the other allegedly similarly-situated veniremember.

Appellant has misapprehended the issue in this case. The sole ground upon which Appellant sought to have this case transferred to this Court is that the trial court applied an improper remedy after it had found that the State had racially discriminated against a veniremember in exercising its peremptory strikes, thereby violating *Batson v. Kentucky*, 476 U.S. 79 (1986). But the record in this case shows that the trial court made no final determination that the State, in exercising its peremptory strike, had "racially discriminated" against this veniremember. At most, the trial court initially disallowed the State's peremptory strike of veniremember Jones based on its erroneous belief that a similarly-situated white

veniremember had not been struck, not because the State had exercised its strikes in a racially discriminatory manner. Once the prosecutor, who was unaware of the allegedly similarly-situated veniremember, used the State's peremptory strikes to remove both potential jurors, the trial court upheld the State's peremptory strike of Jones against Appellant's *Batson* challenge.

Consequently, the proper remedy to be applied when a trial court finds a *Batson* violation is not an issue under the facts of this case. The issue is whether the trial court clearly erred in overruling Appellant's *Batson* challenge to the State's peremptory strike of veniremember Jones. The record shows that the trial court properly concluded that the State did not violate *Batson v. Kentucky* in its peremptory strike of Jones.

A. The record supports the trial court's finding that the State did not violate *Batson v. Kentucky* in exercising its peremptory challenges.

After the State announced its peremptory strikes, Appellant raised a *Batson* challenge to the State's strike of five African-American veniremembers. (Tr. 222-23). Because Appellant failed to carry his burden of showing that the State's race-neutral reasons for striking three of the five veniremembers were pretextual, the court

denied Appellant's *Batson* challenges to those three veniremembers.[4] (Tr. 227-28). But the court stated that it was disallowing the State's peremptory strikes of the other two veniremembers, Dotson and Jones, "under *Batson*." (Tr. 227, 229).

The State's race-neutral reasons for striking veniremember Dotson were that he seemed to be distant and uninterested in voir dire and he had failed to respond to a question about previous jury experience. (Tr. 223). Appellant's counsel responded that Dotson had given appropriate responses, seemed to be paying attention, and that another potential juror had been observed reading during voir dire, but was not struck by the State. (Tr. 226-27). The trial court, relying on the record and its own observations, denied the State's peremptory strike of veniremember Dotson. (Tr. 227).

The State's race-neutral reason for striking veniremember Jones was that she was a witness in a criminal case who underwent cross-examination. (Tr. 225-26). Appellant's counsel responded that

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[4]The State's race-neutral grounds for striking these three veniremembers were that one was employed as a minister (Valentine) and the other two had relatives who were currently, or had recently been, imprisoned (Bell and Hamilton). (Tr.224).

another potential juror (Sestrich) had been a witness, but had not been struck by the State. (Tr. 226). The trial court denied the State "leave to strike" veniremember Jones. (Tr. 229).

After denying the State leave to exercise these two peremptory strikes, the trial court directed the State to make two new strikes. (Tr. 229). This prompted a discussion that revealed that the trial court disallowed the strike of veniremember Jones because it believed that a similarly-situated white veniremember (Sestrich) had not been struck by the State. (Tr. 229-31). After the prosecutor, who was unaware that Sestrich had been a witness at trial, agreed to use a peremptory strike to remove her, the trial court allowed the State to use its final peremptory strike to remove veniremember Jones:

> The Court: As I said, the motion to strike for cause [sic][5] will be denied as to 26 [Jones]. So I'm denying your leave to strike Juror 26 [Jones] and No. 5 [Dotson]. So you have to make two new strikes.

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[5]Although the trial court said it was denying the State's "motion to strike for cause," the record clearly shows that the court was referring to the State's peremptory challenge of Jones and Dotson. (Tr. 221-34).

[The Prosecutor]: Which ones do I have to redo?

The Court: 26 and 5.

[The Prosecutor]: You are not allowing?

The Court: I'm not allowing those strikes.

[The Prosecutor]: Judge, I'm not questioning the Court's judgment, but can you tell me, was there another juror similarly-situated in terms of being a witness? I'm just curious because I didn't have it.

The Court: I did not mark my sheet, but I remember there were others similarly situated. Which ones do you have marked that have been witnesses?

[Appellant's Counsel]: Juror No. 4, who's been stricken. Juror No. 13 [Sestrich].

The Court: Juror No. 4 was stricken for cause.

[Appellant's Counsel]: Correct. There was also Juror No. 13 [Sestrich].

[The Prosecutor]: I'm sorry, Your Honor, I didn't hear anything about her. What if I strike 13 [Sestrich] does that make any difference?

The Court: If you are striking all of those that have been witnesses in cases, then you can strike the two that are

witnesses, but I'm not going to allow you to strike only one.

[The Prosecutor]: I would be happy to do that, but I didn't see that 13 was a witness.

The Court: Are you moving to strike Juror 13 [Sestrich] as one of your State's strikes.

[The Prosecutor]: Yes, sure.

The Court: Then which other one are you seeking to strike?

[The Prosecutor]: Only two I have listed, Judge, as witnesses, only two I have is 26 and 28.

[Appellant's Counsel]: Juror 4 and remaining jurors 13, 28 and 26 indicated they had been witnesses in cases.

The Court: I will then allow the strike of Juror 26 [Jones] in light of the fact that he's also taking 13 [Sestrich].

(Tr. 229-31).

A. Standard of review.

This Court reviews a trial court's decision on a *Batson* challenge under a clearly erroneous standard. An appellate court "may not reverse a trial court's decision as to whether the prosecutor discriminated in the exercise of his peremptory challenges unless it finds that decision clearly erroneous." *State v. Griffin*, 756 S.W.2d 475,

482 (Mo. banc 1982). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm impression that a mistake has been committed." *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. banc 1987). "If the trial court's action is plausible under review of the record in its entirety, an appellate court may not reverse it although had it been sitting as the trier of fact it would have weighed the evidence differently." *State v. Brinkley*, 753 S.W.2d 927, 930 (Mo. banc 1988).

Deference to trial court findings on the issue of discriminatory intent makes particular sense, because the finding will largely turn on evaluation of credibility and the best evidence will often be the demeanor of the attorney who exercises the challenge. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that is settled, there seems nothing left to review." *Id.* at 367.

Parties may not use peremptory challenges against veniremembers based "solely" on impermissible grounds, such as gender and race. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. at 89. The Supreme Court has outlined a three-

step approach in analyzing *Batson* claims:

> Under our *Batson* jurisprudence, once the opponent of peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995). The Missouri Supreme Court has adopted this three-part test in determining whether peremptory strikes resulted from an impermissible motive:

> First, the defendant must object to the state's peremptory strike by identifying the protected group to which the venireperson belongs. The state must then provide a reasonably specific, clear, race-neutral and/or gender-neutral explanation for the strike. Once the state provides a legitimate explanation, the burden shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the venireperson's race or gender.

State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998) (citations omitted); *see also State v. Marlowe*, 89 S.W.3d 464, 468-69 (Mo. banc

2002).

C. The record shows that no other potential jurors were similarly situated with veniremember Jones.

After disallowing two of the State's peremptory strikes, the trial court allowed the State to make two new strikes. When a trial court disallows peremptory strikes based on *Batson*, the proper procedure is to allow the offending party an opportunity to exercise its strikes in a race-neutral manner. *Benedict v. Northern Pipeline Const.*, 44 S.W.3d 410, 418 (Mo. App. W.D. 2001). The problem in this case is that while the trial court professed to deny the strikes based on *Batson*, it never made a final determination that the State had exercised its peremptory strike of Jones in a racially discriminatory manner, which is what *Batson* seeks to prevent. The record reveals that the trial court denied the strike solely because it believed that the State was required to strike what the trial court believed was a similarly-situated white veniremember. But failing to strike a similarly-situated veniremember is simply one, though crucial, factor to be considered, *see Marlowe*, 89 S.W.3d at 469; it does not, by itself, prove a *Batson* violation without a finding of discriminatory intent. Whether caused by confusion over the law or a desire to insulate the record against reversible error, the trial court improperly applied *Batson* to require the

State to strike all similarly-situated veniremembers without regard to discriminatory intent.

Appellant contends that the issue concerns the proper remedy to be applied after the trial court finds that the State's race-neutral strikes are pretextual. But this argument is not supported under the facts of this case. A fair reading of the record shows that the trial court had not finally determined that the prosecutor's race-neutral reason was pretextual. In deciding to disallow the strike, the trial court simply relied on its belief that the State had not struck a similarly-situated veniremember who had also been a witness. Once the prosecutor, who was unaware of this similarly-situated veniremember, agreed to use a peremptory strike to remove that person, the trial court concluded that the State's race-neutral reason was not pretextual.

Appellant's argument rests on the premise that once the trial court stated that it was denying the peremptory strike, it was forever precluded from considering additional information or in reevaluating or changing that ruling. Nothing in the law prevents a trial court from changing a ruling on an objection during the course of voir dire, or during any other part of a trial. In fact, the law encourages trial courts to correct their mistakes during voir dire by denying appellate

consideration of claims of trial court error based on initial rulings concerning juror strikes that the trial court later changed and corrected. *See State v. Oxford*, 791 S.W.2d 396, 399-400 (Mo. banc 1991) (labeling a claim that the trial erred in refusing to strike a potential juror as "patently meritless" when the record showed that while the trial court initially refused to strike the veniremember, it later changed its ruling and struck the juror for cause). This principle also applies to other parts of trial to encourage trial courts to revisit prior rulings and correct them if necessary. *See State v. Johnson*, 901 S.W.2d 60, 62 n.1 (Mo. banc 1995) (refusing to consider a claim of trial court error based on an initial ruling that the trial court later changed); *State v. Allen*, 829 S.W.2d 524, 527 (Mo. App. W.D. 1992) (finding an appellate claim that the trial court erred in sustaining the state's objection to evidence "without merit" when the record showed that the trial court later changed its ruling to allow admission of the evidence). A policy of encouraging trial courts to reconsider and correct their rulings during trial is preferred over one which leaves it up to the appellate courts to correct errors at the potential expense of requiring a new trial.

Whether there were any other veniremembers similarly situated to veniremember Jones is questionable on this record. Although a

few veniremembers stated that they had been witnesses at trial, veniremember Jones was the only one to have been subjected to cross-examination.[6] (Tr.176-77). Common sense dictates that a person who has both testified at trial and underwent cross-examination might view the justice system differently than someone who either had not testified at all, or who had not been cross-examined.

Appellant's counsel's claim at trial was that Jones and Sestrich were similarly situated because both had been a witness at trial. (Tr. 226). But when Appellant's counsel asked the venire whether any of them had been a witness at a trial, Jones responded that she had been while veniremember Sestrich did not respond at all. (Tr. 175-77).

The apparent basis for Appellant's belief that Sestrich and Jones were similarly situated was the fact that Sestrich appeared in court because of a traffic ticket. But Sestrich's testimony on that issue did not establish that she was, in fact, a witness at trial. When asked if she had been to court, Sestrich replied by describing the incident in

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[6]Although Veniremembers Cierpiot and Mizulski had previously been called as witnesses, they had not been subjected to cross-examination. (Tr. 176).

which she received the ticket and then added that she had gone to court and pleaded guilty. (Tr.155). When asked if there had been a trial, Sestrich stated that other people had witnessed the incident, but she never directly answered the question of whether there had been a trial. (Tr.155-56). At no point during voir dire did Sestrich ever state that she had been a witness at a trial.

D. The trial court did not clearly err in determining that Appellant failed to prove that the State exercised its peremptory strike in a racially discriminatory manner.

In determining whether the prosecutor's race-neutral reasons are pretextual, this Court has established a non-exclusive list of factors to consider. *See State v. Edwards*, 116 S.W.3d 511, 527 (Mo. banc 2003); *State v. Parker*, 836 S.W.2d 930, 939-40 (Mo. banc 1992). The primary consideration is the "plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *Edwards*, 116 S.W.3d at 527, *quoting Parker*, 836 S.W.2d at 940. Here, the prosecutor's desire to remove potential jurors who had been witnesses is plausible considering that numerous witnesses testified during trial and the credibility of that testimony was the key to determining Appellant's guilt. This concern was heightened by the fact that Jones was apparently the only such witness who had been subjected to cross-examination.

Appellant contends that the prosecutor's concern about Jones's cross-examination is illusory because, contrary to the prosecutor's claim that Jones "didn't care for" the experience, (Tr. 225-36), Jones's responses showed that it hadn't bothered her and that there was nothing about that experience that would prevent her from

serving as a juror, (Tr. 177). Appellant's argument, however, confuses peremptory strikes with strikes for cause. Under *Batson*, the State does not have to prove that Jones was unable to serve as a juror; it must only provide a valid, race-neutral explanation for its decision to exercise a peremptory strike. It does not matter whether the Jones liked or disliked the experience of being cross-examined. What does matter is that she was, in fact, cross-examined and that this was a valid, race-neutral reason for the State to use a peremptory strike to remove her.

Appellant also suggests pretext from the fact that the question asking the veniremembers about any previous experience testifying in court came from Appellant's counsel, not from the prosecutor. But nothing in the law suggests that the State may base its strikes, whether peremptory or for cause, only on information elicited during its portion of voir dire. Accepting Appellant's argument that pretext can be discerned based on who asked the question would only encourage prosecutors to engage in needlessly extensive and time-consuming voir dire or force them to repeat or rephrase questions asked by the defense to elicit information they already know.

Second, the "existence of similarly-situated white jurors who were not struck by the prosecution is certainly probative of pretext."

Id. "Although not dispositive, this factor is so relevant in determining pretext that it is 'crucial.'" *State v. Marlowe*, 89 S.W.3d at 469. This was the single factor on which the trial court relied in initially disallowing the State's strike of veniremember Jones. The prosecutor's failure to recognize that veniremembers Jones and Sestrich were similarly situated is explained by the fact that they were not. But once the prosecutor was reminded — albeit erroneously — that another veniremember (Sestrich) had also been a witness at trial, the prosecutor asked permission to use his peremptory strikes to remove both veniremembers. With that, the reason behind the trial court's refusal to allow the strike evaporated.

The third factor is "the degree of logical relevance between the proffered explanation and the case to be tried in terms of the kind of crime charged, the nature of the evidence to be adduced, and the potential punishment if the defendant is convicted." *Edwards*, 116 S.W.3d at 527, *quoting Parker*, 836 S.W.2d at 940. Here, the case involved the charge of first-degree murder in which the testimony of the witnesses was critical to the jury's determination of guilt. Whether the jurors had been witnesses themselves was, therefore, relevant to the prosecutor's interest in identifying those potential jurors and removing them from the jury.

The fourth factor the court should consider is the "prosecutor's demeanor or statements during voir dire, . . . as well as the demeanor of the excluded venirepersons." *Id.* Obviously, the prosecutor's demeanor convinced the trial court that the proffered reason for the strike was not pretextual once the prosecutor amended his strikes to include the veniremember the court believed was similarly situated. Related to this factor is the fifth factor, which is the court's past experience with the prosecutor. The court's past experience apparently convinced it that the prosecutor did not have a discriminatory motive in striking veniremember Jones.

Finally, "[o]bjective factors bearing on the state's motive to discriminate on the basis of race, such as conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses, are also worthy of consideration." *Id.* Those considerations do not alter the analysis here. The defendant, victim, and the material witnesses in this case were all African-American. No strategic advantage would have been gained by removing African-American veniremembers. Consequently, this factor weighs in favor of the trial court's conclusion that the State had no discriminatory motive in making this strike.

Appellant makes much of the fact that the trial court upheld his

Batson challenge to the State's strike of veniremember Dotson. But the trial court's decision on that strike is more a function of the prosecutor failing to make a proper record to support the strike rather than a finding of discriminatory purpose. The prosecutor claimed that veniremember Dotson was distant and uninterested, but the record shows that the prosecutor made no contemporaneous record to support this claim during voir dire.

Appellant, on the other hand, told the trial court that veniremember Dotson was paying attention. The trial court apparently did not observe the inattentive behavior the prosecutor saw, and, therefore, it disallowed the State's peremptory strike in the face of Appellant's *Batson* challenge. Simply because the prosecutor failed to make a record to support his claim of inattentiveness does not translate into a finding of discriminatory intent that infects every peremptory strike made by the State, especially in view of the fact that the trial court upheld the State's other peremptory strikes.

In the end, *Batson* challenges turn on the record made during voir dire. If the record made by the State is inadequate, courts are likely to disallow peremptory strikes that are challenged under *Batson* not necessarily because the court finds discriminatory intent, but to avoid reversal on appeal based on an inadequate record. This is especially

true regarding claims of inattentiveness, which courts have stressed must be contemporaneously documented in the record to enable the opponent, as well as the court, to witness the behavior and make a record. *See State v. Metts*, 829 S.W.2d 585, 587 (Mo. App. E.D. 1992); *State v. White*, 913 S.W.2d 435, 437 (Mo. App. E.D. 1997).

The trial court did not clearly err in denying Appellant's *Batson* claim concerning the State's peremptory strike of veniremember Jones.

II.

The trial court did not abuse its discretion in allowing the victim's fiancee to testify about acts of vandalism to their home because this testimony was relevant and was not evidence of other crimes in that this testimony explained the animosity between the victim and the people gathered at Appellant's house and it was not evidence of other crimes because none of the acts were directly connected to Appellant.

Appellant contends that the trial court erred in allowing the victim's fiancee to testify about two prior acts of vandalism to their house after they moved into the neighborhood. Appellant argues that this constituted other crimes evidence and was irrelevant because none of these acts were connected to him. But because these acts were not directly tied to Appellant, they cannot be considered as evidence of other crimes. Moreover, this evidence was relevant to the animosity felt between the victim and Appellant and his friends, thus establishing a motive for the murder. Consequently, the trial court committed no error in allowing this testimony into evidence.

A. The testimony regarding acts of vandalism committed against the victim's property.

The victim's fiancee testified that soon after they moved into their new house, they regretted moving there:

Q. [The Prosecutor] Ms. Miller, after you moved in that house, did you regret moving in that house, did you regret moving in that home?

A. Yes.

Q. What happened? What was going on in the neighborhood that made you regret moving in to that house?

A. First of all, when I moved there, the people across the street threw –

[Appellant's counsel]: Your Honor, I'm going to object pursuant to my motion in limine.

The Court: Overruled.

A. Go ahead?

The Court: You may answer, ma'am.

A. They spray painted my garage door with orange paint. And the second thing, that they left water on the side of my house just running for a whole day.

Q. [The Prosecutor] Let me back up. Your garage door got spray painted?

A. Yes.

[Appellant's Counsel]: Your Honor, again I object and ask that an ongoing objection be noted for this line of testimony.

The Court: Objection is noted. Objection is overruled.

Q. [Prosecutor] Okay. So you said the garage door got painted?

A. Yes.

Q. All right. How was it painted – well, you didn't hire a company to got out and paint your garage door?

A. No.

Q. Vandals?

A. It was painted orange.

Q. Okay. And then you said that your water was left on one day too, right?

A. Yes.

Q. What do you mean by that?

A. The water hose was just running on the side of the house.

Q. You meant where the spigot is on the outside?

A. Yes.

Q. So someone turned that on?

A. Yes.

Q. It was running all day?

A. Yes.

Q. Is this the stuff that happened when you first moved in?

A. Yes, it did.

Q. Okay. What else was going on?

A. It was just a number of things. People jumping in and out of cars, getting back in, getting out of them. Some of them was knocking at my door.

[Appellant's Counsel]: Your Honor, can we approach?

[Prosecutor]: Judge, I'm going to ask that–

The Court: Overruled. Request is denied.

[Defense counsel]: Your Honor, I object unless there's going to be testimony that [Appellant] did this, somebody saw [Appellant] do this. This is prior bad acts, no relevance to this case whatsoever.

The Court: Overruled.

Q. [Prosecutor] You can continue.

A. And so we had went to the police numerous times telling them what was going on, even stop the police and tell them what was going on, and we never get no response or anything of what could happen or what was going to happen.

(Tr. 375-78).

B. Standard of review.

The trial court is vested with broad discretion to admit and

exclude evidence at trial. Error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

"In a criminal proceeding, questions of relevance are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown." *State v. Santillan*, 1 S.W.3d 572, 578 (Mo. App. E.D. 1999). A trial court will be found to have abused its discretion only when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

Although the general rule is that evidence of uncharged crimes or misconduct is inadmissible for the purpose of showing the defendant's propensity to commit such crimes, evidence of a defendant's prior misconduct is admissible if it is both logically and

legally relevant. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). Evidence is logically relevant if it has some legitimate tendency to prove the defendant's guilt of the crimes for which he is on trial, and evidence is legally relevant if its probative value outweighs its prejudicial effect. *Id*. Generally, evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity of the person charged. *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). The evidence at issue need not fall within one of these five commonly-enumerated grounds to be admitted, however, if the evidence is relevant for any reason to show the defendant's guilt. *Bernard*, 849 S.W.2d at 13; *State v. Skillicorn*, 944 S.W.2d 877, 887 (Mo. banc 1997).

The trial court has broad discretion in deciding whether to admit or exclude such evidence, and an abuse of the court's discretion will not be found "unless the trial court's decision in admitting the challenged evidence 'is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *State v. Scurlock*, 998 S.W.2d 578, 587 (Mo.

App. W.D. 1999), *quoting Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991).

C. The vandalism testimony was not inadmissible evidence of other crimes committed by Appellant.

To violate the rule prohibiting evidence of other crimes or misconduct by the defendant, the evidence must show the defendant committed, was accused of, was convicted of, or was definitely associated with, the other crimes or misconduct. *State v. Ponder*, 950 S.W.2d 900, 911-12 (Mo. App. S.D. 1997). When the reference to the other conduct is vague or speculative, it cannot be characterized as clear evidence associating a defendant with other crimes and does not violate the rule against evidence of other crimes. *State v. Rush*, 949 S.W.2d 251, 255 (Mo. App. S.D. 1997); *State v. Bickham*, 917 S.W.2d 197, 199 (Mo. App. W.D. 1996). Vague remarks or references cannot be characterized as clear evidence definitely associating the defendant with the commission of other crimes. *State v. Norton*, 949 S.W.2d 672, 677 (Mo. App. W.D. 1997); *State v. Rush*, 949 S.W.2d at 255. Appellant bears the burden of showing that the challenged testimony constituted evidence of other crimes. *State v. Wallace*, 952 S.W.2d 395, 397 (Mo. App. W.D. 1997).

Nothing in the victim's fiancee's testimony directly tied Appellant to the acts of vandalism she described. The only two acts of vandalism she described, spray painting the garage and leaving the

water on, were not attributed to any particular person. To the extent she implied that the people who were gathered at the house across the street had anything to do with it, this vague reference was insufficient to directly tie Appellant to the acts of vandalism she described. Consequently, the trial court did not abuse its discretion in admitting this testimony into evidence.

D. The testimony was relevant evidence concerning the animosity between Appellant and the victim and established a motive for the murder.

Moreover, this testimony was relevant to establish a motive for the murder. Although the victim's fiancee did not directly associate Appellant with the acts of vandalism and other disruptive behavior occurring at the house across the street, she did state that Appellant was "over there every day." (Tr. 379). Whether the acts of vandalism were tied directly to Appellant was not important. What was important was the fact that the victim and his family were upset about activities involving the people across the street, which group Appellant was part of, and that they called the police to complain about these individuals. The record also shows that Appellant and his friends were upset that the police had been called on them.

The trial court did not abuse its discretion in admitting this evidence which was relevant to prove the motive behind the

shooting. The prejudicial effect of this testimony, which consisted only of speculation that Appellant might have been involved in spray painting a garage and leaving the water running, was outweighed by the probative value of the evidence in establishing a motive for the murder.

Appellants' reliance on *State v. Moore*, 645 S.W.2d 109 (Mo. App. W.D. 1982), and *State v. Jordan*, 664 S.W.2d 668 (Mo. App. E.D. 1984), is misplaced.

In *Moore*, the defendant was charged with robbing a gas station at gunpoint. 645 S.W.2d at 109. After the robbery, the defendant was seen running through a scrap yard and was later captured in a nearby building, but had neither the money from the robbery nor the gun used to commit it when he was caught. *Id.* At trial, the state introduced into evidence a gun found in the scrap yard, but the station attendant had testified that he did not think it was the same gun the defendant used in the robbery. *Id.* at 110. The court of appeals held that the gun was improperly admitted because it could not be tied to either the defendant or the crime. *Id.* The basis for the court's holding, however, was the prejudice resulting from admitting a lethal weapon into evidence and attempting to link it to the defendant:

> Lethal weapons completely unrelated to and unconnected with the criminal offense for which an accused is standing trial have a ring of prejudice seldom attached to other demonstrative evidence, and the appellate courts of this state have been quick to brand their admission into evidence, and any display of or reference to them during closing argument, as prejudicial error.

Id. (quoting *State v. Charles*, 572 S.W.2d 193, 198 (Mo. App. K.C.D. 1978).

The basis for the Moore court's holding is that the admission of lethal weapons, especially guns, is viewed more critically than the admission of other evidence because of the inherent prejudice associated with showing weapons to the jury. That principle does not apply in this case, which simply involved testimony concerning acts of vandalism.

The court's holding in *Jordan* is similarly unhelpful to Appellant. The defendant in *Jordan*, a black male, was charged with auto theft. 664 S.W.2d at 669. The stolen car's owner testified that she saw a black male break into and drive away in her car. *Id.* A few minutes later, the police found the car out of fuel at a nearby gas station and saw the defendant walking away from the station. *Id.* But a gas station attendant, whom the defendant called as a witness at trial,

testified that he saw the stolen car when it was parked at the pumps and saw only one occupant in the car, who was a white male, get out and walk to the restrooms. *Id.* at 670.

At trial, the prosecutor was permitted to cross-examine the station attendant with a police report stating that a different employee at the station received a threatening phone call from a black male caller saying that he was the man from the stolen car and that if he ever saw the attendants from the station again, they would be dead. *Id.* The court of appeals held that the prosecutor's questions specifically asked the attendant, who never received the threatening call, for confirmation of the other attendant's out-of-court statement that such a call was received. *Id.* The court held that this evidence was improper not only because the state failed to present any evidence connecting the defendant to the call, but also because the state offered no admissible evidence that such a call was even made. *Id.* at 672.

E. Appellant suffered no prejudice from the admission of testimony concerning the acts of vandalism.

When a defendant complains about the admission of evidence, he has the "dual burden" of establishing that the admission of this evidence was error, and that this error was prejudicial. *State v. Isa*, 850

S.W.2d 876, 895 (Mo. banc 1993). In reviewing for "prejudice," reversal is warranted "only if the admitted evidence was so prejudicial that it deprived the defendant of a fair trial. *State v. Richardson*, 923 S.W.2d 302, 311 (Mo. banc 1996). Absent a showing that the evidence inflamed the jury or diverted its attention from the issues to be resolved, admitted evidence, even if immaterial or irrelevant, will not constitute prejudicial error. *State v. Stoner*, 907 S.W.2d 360, 364 (Mo. App. W.D. 1995). Mere allegations of prejudice are insufficient to meet this burden. *Id.*

In determining whether the improper admission of evidence is harmless error this Court employs the "outcome-determinative" test. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. banc 2000); *State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001). Improperly admitted evidence is outcome-determinative when it has "an effect on the jury's deliberations to the point that it contributed to the result reached." *Barriner*, 34 S.W.3d at 151. In other words, a finding of outcome-determinative prejudice occurs when "the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence." *State v. Black*, 50 S.W.3d at 786; *see also State v.*

Barriner, 34 S.W.3d at 150.

Testimony that the acts of vandalism were committed on the victim's house was not evidence that was "outcome-determinative." Considering that this was a first-degree murder case involving a victim who was gunned down in his own garage while getting out of his car, it cannot be seriously argued that testimony about what amounted to nothing more than pranks so inflamed the jury that it based its guilty verdict on this evidence.

III.

The trial court did not abuse its discretion in overruling Appellant's objection to the admission into evidence of letters Appellant wrote to his friend Sam Williams after the pair were charged with the murder because those letters were relevant and revealed Appellant's consciousness of guilt in that the letters, which included statements in which Appellant accused Williams of selling Appellant out to "white folks" and "white crackers," revealed Appellant's strategy to appeal to Williams's sense of racial and personal allegiance in an effort to hide Appellant's involvement in the crime by keeping Williams from talking to the police.

Appellant contends that the trial court abused its discretion in allowing into evidence letters that Appellant wrote to his friend Sam Williams after the pair had been arrested in connection with this case. (Tr. 27-30). Appellant argues that the letters contained irrelevant, bad character evidence. But the actual content of those letters showed that Appellant was engaged in an on-going effort to keep Williams from telling the authorities that Appellant had shot the victim.

Before trial, Appellant filed a motion in limine to keep these letters out of evidence. (Tr. 27-29). Appellant complained that the letters contained "vague" references to prior bad acts. (Tr. 37). The State responded that the letters showed Appellant's attempts to keep

Williams quiet about the shooting and, thus, were evidence of Appellant's consciousness of guilt. (Tr. 30-31). After reading the letters itself, the trial court overruled Appellant's motion in limine. (Tr. 39).

At trial, a handwriting expert testified that Appellant had written the letters. (Tr. 640). Williams testified that while he was incarcerated awaiting trial, he received these letters from Appellant. (Tr.775). Williams testified that in the letters Appellant told Williams to "keep his mouth shut" and that if the time came, Appellant would "stand up and take his weight." (Tr.775-77).[7]

B. Standard of review.

The standard of review regarding the trial court's admission of evidence is set out in Point II.

C. The trial court did not err in admitting Appellant's letters into evidence because they were relevant to prove he committed the crime and to demonstrate his efforts to conceal his guilt.

Read in context, the letters reveal Appellant's attempts to keep Williams from talking to the police and show that Appellant had, in

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[7]Copies of the letters, which were admitted into evidence at trial (State's Exhibits 151-157), are included in the Appendix to this brief.

fact, shot the victim. In an effort to support his claim of trial court error, however, Appellant relies on excerpts of these letters taken out of context.

Although Appellant generally complains about the letters being admitted into evidence, his brief recites only one excerpt, which he contends was irrelevant. App. Br. at 49. In that excerpt, Appellant complains about Williams giving the police and prosecutors information that Appellant committed the murder:

> When you said what said and did what you did, you let me know you was all about self and your freedom and you was saying fuck my life. Sam man I was out there willing to die for you, willing to give you my last whatever. A motha fucka couldn't put they hands on you without putting they hands on me too. And the bad part about it is you sold me to some white folks, you didn't sale me for a 100,000 of green money but to some white crackers who love to see us go against each other. All they letting us know is who this world belongs to and we can turn ya'll (Black People) against each other in any situation, so therefore this world will never belong to ya'll. See they think this world belongs to them.

Although Appellant complains that the jury should not have seen

Appellant's references to "white folks" and "white crackers," the relevance of this excerpt speaks for itself.

These references were vital to the jury's understanding of Appellant's motives in writing the letters and assessing Appellant's consciousness of guilt concerning the murder. Appellant was attempting to manipulate Williams into keeping quiet by appealing to a misguided notion of personal allegiance and racial solidarity. In other words, it was better for Williams to keep quiet than for him to break not only a personal bond with Appellant, but also a bond he shared with the other members of his and Appellant's race. The reference to "white folks" and "white crackers" is obviously a reference to the police and prosecutors to whom Appellant was afraid Williams would talk.

This excerpt, in combination with other excerpts appealing to the friendship between Appellant and Williams and alternately threatening Williams if he talked, showed a pattern by which Appellant attempted to keep Williams from implicating Appellant as the shooter. The content of these letters, including the racial references he made, were highly probative of Appellant's guilt.

Appellant's attempt to liken this evidence to that which was condemned in *State v. Driscoll*, 55 S.W.3d 350 (Mo. banc 2001), and

State v. Johnson, 456 S.W.2d 1 (Mo. 1970), is entirely misplaced.

In *Driscoll*, the state presented evidence that the defendant, who was charged with murdering a prison guard, was a member of a hate group of white prisoners known as the Aryan Brotherhood. 55 S.W.3d at 352-53. The defendant objected to this evidence on the grounds that it was irrelevant to the murder of the prison guard (who was white) and that it permitted the jury to infer that by being a member of this group, the defendant had a propensity for murder and violence. *Id.* at 353. This Court agreed holding that the logical relevance of this evidence "was tenuous at best" and that its prejudicial effect "far outweighed its probative value." *Id.* at 354. The court reached this conclusion by relying on the fact that no evidence indicated either that the killing was racially motivated or that the killing was prompted by the defendant's desire to improve his standing in the group. *Id.* at 354-55. The court held that this was simply propensity evidence to portray the defendant as a racist and a person of bad character who advocated violence. *Id.*

In *Johnson*, the State offered into evidence a letter the defendant wrote while he was in jail awaiting trial on a murder charge. 456 S.W.2d at 2. In this letter, the defendant wrote about the outcome of a case against a co-defendant and described his attorney's appraisal

of what would likely happen in the defendant's case. *Id.* at 2. The court held that it was error for the letter to be admitted in its entirety because the state would not have been allowed to present evidence about the result of the co-defendant's case or what the defendant's attorney had told him. *Id.* at 4.

Neither *Driscoll* nor *Johnson* apply to the circumstances of this case. Appellant's letters to Williams were highly probative of Appellant's consciousness of guilt and the trial court did not err in admitting them into evidence.

IV.

The trial court did not abuse its discretion in allowing the victim's fiancee or stepson to testify that they had not seen Appellant wearing glasses or the type of clothes he wore at trial because this evidence was relevant in that this testimony bore on the credibility of their identification of Appellant and the attire he wore on the night of the murder.

Appellant complains that the trial court abused its discretion in allowing the State to ask the Appellant's fiancee and her son about Appellant's courtroom attire.

A. The testimony concerning Appellant's courtroom attire.

The victim's fiancee's son testified that Appellant lived across the street and that he had seen Appellant having an argument with the victim on the night of the murder. (Tr. 336, 341). The prosecutor then asked the witness to identify Appellant for the jury:

Q. Okay. Do you see him in the courtroom today?

A. Yes.

Q. Would you point him out to the jury.

A. Right here.

Q. All right. Where is he sitting at the table? Next to who?

A. Between the lady and the man.

Q. All right. And what's he wearing?

A. A tan looking suit.

Q. Okay. Coat and tie?

A. Yes.

Q. And glasses?

A. Yes.

Q. Now, you said you recognize him from the neighborhood earlier?

A. Yes.

Q. Did you ever see him in a coat an tie and glasses before?

A. No.

(Tr. 336-37). At this point, Appellant's counsel objected on the ground that Appellant's attire was irrelevant. (Tr.337). During a bench conference, Appellant's counsel complained that questions about Appellant's attire was "an attempt to show bad character" on Appellant's part. (Tr. 337-38). The prosecutor responded that the credibility of the witness's identification of Appellant was important:

> [The Prosecutor]: Your Honor, the night of the homicide, Daryl Chatman–I'm sorry, the witness Calvin, and his mother, Domonica Miller, responded to the St. Louis County police station and they were asked to give a description of the Defendant, Ronald Hampton, and also identify Ronald

Hampton. He told the police he knows Ronald Hampton from across the street, and the description that he gives is important with respect to his credibility, credibility of his identification at the time.

The Court: Objection is overruled.

[Appellant's Counsel]: He can identify–if he wants to ask him what he was wearing that day, that's a different question as to what he wears around the neighborhood.

The Court: I'll limit the inquiry to what he sees him wear in the 24-hour period surrounding this particular event.

(Tr. 338). The prosecutor then asked the victim's stepson to describe what Appellant was wearing on the day of the murder. (Tr. 339).

The prosecutor also asked the victim's fiancee to identify the person who threatened the victim during an argument in the hours before the murder:

Q. When you say you heard him say that, who do you--

A. Ronald.

Q. You mean Ronald Hampton, the Defendant?

A. Yes. He said, I'm getting your ass, nigger.

Q. Would you point–just for the record, would you point out and describe the person you heard say that.

A. Right there in front of me.

Q. What is he wearing?

A. Tan suit with white shirt.

Q. And the glasses?

A. Yes.

Q. Now, when he said that to you, was he wearing a coat and tie and wire-rim glasses?

A. No.

[Appellant's Counsel]: Your Honor, object. That is improper.

The Court: Overruled.

A. No

Q. [By Prosecutor] Had you ever seen him wear that before?

A. No.

Q. What was he wearing the night that he was saying these things?

A. He was wearing some bluejeans and a red pullover sweater. (Tr. 388-89).

B. Standard of review.

The standard of review regarding the trial court's admission of evidence is set out in Point II.

C. The testimony concerning Appellant's courtroom appearance was relevant to

the witnesses' identification testimony of Appellant on the night of the murder.

The prosecutor's questions to the two eyewitnesses who saw Appellant on the night of the murder concerning Appellant's attire and whether he wore glasses was relevant to establish their credibility in identifying Appellant to the jury. Appellant's life-long friend, Sam Williams, testified that he had never seen Appellant wearing glasses. (Tr. 843-44). Part of the defense strategy involved the fact that Appellant and Sam Williams were both wearing red shirts on the night of the murder. (Tr. 357, 829, 938). Showing that these eyewitnesses could identify Appellant notwithstanding his in-court or out-of-court attire was, therefore, a relevant inquiry.

Appellant's reliance on *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992), is curious, since the holding in that case actually supports the trial court's action here. In *Ervin*, the defendant argued that the trial court plainly erred in allowing the prosecutor during voir dire to ask the venire whether any of them would be swayed by the defendant's courtroom attire (a three-piece suit) and somehow believe that the defendant wouldn't commit murder based on the way he appeared in court. *Id.* at 914. The court held that the prosecutor's question was entirely proper:

> A defendant's attire at trial, and his or her overall appearance, are wholly irrelevant to the ultimate question of his or her guilt or innocence. The prosecutor's challenged inquiry sought to determine which venirepersons, if any, were likely to give improper credence to irrelevant factors in their deliberation of Ervin's guilt or innocence. Such an inquiry is legitimate during *voir dire*.

Id.

Consequently, the prosecutor's questions, to the extent that they drew attention to the fact that Appellant had changed his attire, even to the extent of wearing glasses, was not objectionable since it was Appellant's attire on the night in question and the witnesses' ability to identify him in court despite what he was wearing that was important.

D. Appellant suffered no prejudice from questions concerning his courtroom attire.

Alternatively, even if this testimony was irrelevant, its admission did not constitute reversible error. The admission of irrelevant or inadmissible evidence, otherwise free of prejudice, cannot constitute reversible error. *State v. Scott*, 560 S.W.2d 879, 881 (Mo. App. St.L.D. 1977). Irrelevant or immaterial evidence is

excluded, not because it is inflammatory or prejudicial, but because its admission has a tendency to draw the jury's attention from the issues it has been called upon to resolve. *Id.* In fact, in most cases, "[i]rrelevancy . . . operates to mitigate a claim of prejudice." *State v. Lager*, 744 S.W.2d 453, 457 (Mo. App. W.D. 1987).

In determining whether the improper admission of evidence is harmless error, the Missouri Supreme Court employs the "outcome-determinative" test. *Barriner*, 34 S.W.3d at 150; *Black*, 50 S.W.3d at 786. Improperly admitted evidence is outcome-determinative when it has "an effect on the jury's deliberations to the point that it contributed to the result reached." *Barriner*, 34 S.W.3d at 151. In other words, a finding of outcome-determinative prejudice occurs when "the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence." *State v. Black*, 50 S.W.3d at 786; *see also State v. Barriner*, 34 S.W.3d at 150.

Appellant cannot seriously argue that questions about his courtroom attire so prejudiced the jury that the testimony affected the result of the case. To presume that the jurors were unaware, even before this testimony, that Appellant wore a suit to court but did not

wear one while running around the neighborhood is ridiculous. To further contend that the jurors were so outraged that Appellant would wear a suit and glasses to court that they found him guilty of first-degree murder is simply nonsensical. The trial court did not abuse its discretion in allowing testimony concerning Appellant's attire into evidence.

V.

The trial court did not abuse its discretion in overruling Appellant's motion for mistrial on the ground that the Prosecutor "yelled" for Appellant's mother to be removed from the courtroom because the drastic remedy of a mistrial was not warranted in that the record does not reflect that the jury knew that the woman was Appellant's mother and the trial court stated on the record that it found nothing biased or prejudicial in the prosecutor's actions.

Appellant contends the trial court abused its discretion in refusing to declare a mistrial after the prosecutor "yelled" for Appellant's mother, who was endorsed as a state's witness, to be removed from the courtroom. Appellant claims he was prejudiced because the jury might have inferred that his mother had adverse testimony to present against him, but was unwilling to testify. The record simply does not support Appellant's speculative claim.

A. The record regarding the removal of witnesses from the courtroom.

While Appellant's counsel was conducting cross-examination of the investigating detective, the prosecutor started to say: "Your Honor, I'm going to ask that the woman–", but was cutoff by Appellant's counsel's request for a bench conference:

> [Appellant's Counsel]: That should have been done sidebar. It's inappropriate doing that in the back of the courtroom,

making a spectacle in front of the jury.

The Court: So ordered.

[The Prosecutor]: Judge, these people in the courtroom are witnesses of Ms. Grosser [Appellant's Counsel].

[Appellant's Counsel]: Who are these people?

[The Prosecutor]: They are the Defendant's parents.

[Appellant's Counsel]: I have no intention of calling them. I did a blanket endorsement. They've been specifically endorsed by the State. I didn't subpoena them.

The Court: Do you anticipate calling them as witnesses for the State?

[The Prosecutor]: Judge, right now I'm going to call the lady in the back of the courtroom.

[Appellant's Counsel]: Well, Your Honor, I'm going to object.

[The Prosecutor]: She's a material witness. We've been looking for her.

The Court: Was she an endorsed witness?

[Appellant's Counsel]: She's an endorsed witness but I'm going to object because of the exclusionary rule that's been in place.

[The Prosecutor]: I didn't know she was here.

[Appellant's Counsel]: Well, that's not my fault. She's your witness.

[The Prosecutor]: I've never even seen her before.

The Court: I will direct she be excluded from the courtroom for the remainder of the trial.

[Appellant's Counsel]: Can we do it quietly.

The Court: Yes.

[Appellant's Counsel]: Your Honor, that was uncalled for. That was a spectacle. I want [The Prosecutor] told that that kind of stuff does not go on any longer. That's his witness. If his witness comes in here and sits in here, he can't sit out there and scream at us in the courtroom.

[The Prosecutor]: Judge it's their witness as well

[Appellant's Counsel]: She's not my witness. I'm not calling her. I've never met her.

The Court: Now, wait. You endorsed her as a witness, did you not?

[The Prosecutor]: Yes, I did.[8]

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[8]Although the transcript indicates that the Prosecutor made this response, a fair reading of the record indicates that this question was

The Court: Then it's up to you to make sure witnesses are excluded. It's your obligation to get her out quietly.

[Appellant's Counsel]: I'm sorry, Judge, can you just ask the bailiff to quietly ask her to leave.

The Court: I think he's been trying to do so and she's been refusing. I'm going to direct that if she does not leave, she will be arrested and held in contempt.

(Tr. 726-28).

In open court, the trial court stated: "The two people in the back of the courtroom, I'm going to ask that you leave the courtroom. You are endorsed witnesses. You are not allowed to be in the courtroom." (Tr. 729). Appellant's counsel then approached the bench and asked for a mistrial based on a "combination of stunts" that was preventing Appellant from receiving a fair trial. (Tr. 729-30). The trial court overruled that motion. (Tr. 730).

Later, Appellant's counsel asked for another bench conference to make a record concerning this incident:

Your Honor, I wanted to make a record. During the testimony of Detective Wheeler, during the cross-examination, the State

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most likely posed to Appellant's counsel.

made a showing loudly asking that a particular witness be excluded from the courtroom. The inference in his tone and his manner was that the defense was doing something improper with regard to that witness. I've made no representation I was going to call that witness. I did a blanket endorsement. The State specifically endorsed that particular witness, the client's mother. The State's actions create an improper inference that could be attributable to the Defendant and to his counsel. The State called her, the bailiff came in, and you indicated you were not going to force her to testify. The bailiff who had been out in the hall, he came into the courtroom, partially into, a couple of rows and said she had left and that security had gone after her. I was standing near the counsel table, which is precisely in the same position as the jury box, and I was able to hear that. I asked to approach and make a sidebar as to that out of the hearing of the jury. That was denied.

For those reasons, I'm going to ask for a mistrial. This jury pool has been through repeated attempts — specifically that this jury has been improperly tainted and improperly poisoned against me and my client, more specifically and more importantly, my client.

The Court: The motion is denied. I think the record needs to reflect that this has been a particularly difficult case, that the case has not moved along smoothly and has been problematic all the way through. Trying to impose the exclusionary rule has been particularly problematic in this case. I know the bailiff has throughout been monitoring people in the courtroom, and quite a few have refused to tell him who they are or that they are endorsed witnesses. It was inappropriate for the State to yell out that those people need to be excluded from the courtroom. But I don't believe that there's anything biased or prejudicial by the conduct of the Prosecutor in what he did. Your motion is denied.

(Tr. 747-48).

B. Standard of review.

The declaration of a mistrial is a drastic remedy which should only be employed in the most extraordinary circumstances. *State v. Sidebottom*, 753 S.W.2d 915, 919-20 (Mo. banc 1988); *State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). Because the trial court is in a better position than an appellate court to evaluate the prejudicial effect of the incident giving rise to the mistrial request,

this Court's review extends only to determining whether, as a matter of law, the trial court abused its discretion in refusing to declare a mistrial. *State v. Young*, 701 S.W.2d 429, 434 (Mo. banc 1985).

C. The record shows that the trial court properly overruled the motion for the drastic remedy of a mistrial.

The main thrust of Appellant's argument is that by the prosecutor "yelling" for Appellant's mother to be removed from the courtroom, the jury might have inferred that she had adverse testimony to give against her son. Aside from the far-fetched notion that the jury would automatically infer that Appellant's mother would testify against him, Appellant's claim collapses on the fact that the record does not reflect that the jury was even aware that the woman was, in fact, Appellant's mother.

Appellant also complains about the trial court's denial of a bench conference to handle the situation. But the record shows that a bench conference lasting over several transcript pages was had between the court and the attorneys. The only statement made by the court in front of the jury was its directive that the "two people in the back of the courtroom" leave because they were endorsed witnesses. Nothing in that statement suggested that the two people were Appellant's parents or that Appellant's mother had damaging

testimony to present against her son. Finally, the court noted on the record that the Prosecutor did nothing prejudicial or biased against Appellant. The trial court was in the best position to assess the prejudice of what had occurred in determining whether to declare a mistrial. The record in this case supports the conclusion that the court did not abuse its discretion in overruling Appellant's motion for mistrial.

Appellant's reliance on *State v. Hamilton*, 791 S.W.2d 789 (Mo. App. E.D. 1990), and *State v. Harris*, 662 S.W.2d 276 (Mo. App. E.D. 1983), do not assist him here.

In *Hamilton*, a prosecution witness began crying after taking the stand. 791 S.W.2d at 794-95. When the defendant approached her, the witness sobbed harder and threw her arms around the prosecutor while continuing to cry. *Id.* at 795. The appellate court, while noting that emotional outbursts should be avoided, held that the trial court did not abuse its discretion in "denying the drastic remedy of a mistrial." *Id.*

In *Harris*, the appellate court ordered a new trial when the record showed that the prosecutor's closing argument implied that "defense counsel suborned perjury or fabricated a defense." 662 S.W.2d at 277. As an aside, the appellate court noted that the defendant did not

receive a fair trial because of the "continued harangue between the prosecutor and defense counsel." Although the court didn't describe the extent of this "harangue," nothing in the record of this case suggests that a "harangue" existed between the Prosecutor and Appellant's counsel in this case, or that Appellant's counsel was accused of suborning perjury.

Consequently, Appellant has failed to demonstrate that the trial court abused its discretion in refusing to declare the drastic remedy of mistrial.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief complies with the limitations contained in Rule 84.06 in that it contains 12,257 words, excluding the cover, this certification and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed on February 24, 2005, to:

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